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No. 192

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM LLOYD BARNARD, JOHN W. DAILEY, CHARLES W. HUMPHREY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITIONERS' REPLY BRIEF

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The Court has requested a response to the following sentence of petitioners' reply brief (p. 6): "Also, we would like to point out that the Government's appeal from the trial Court's ruling in favor of defendants should have been to this Court, rather than the Court of Appeals, as it admittedly involved the interpretation of a Federal Statute." That contention, raised for the first time in the reply brief, calls into question the jurisdiction of the court of appeals under the Criminal Appeals Act, *infra*, to entertain the government's appeal from the orders of the district court dismissing the indictments.

The pertinent provisions of the Criminal Appeals Act, 18 U. S. C. 3731, are as follows:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * *
>
> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> * * * * *
>
> If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

Under that Act, a dismissal of an indictment is appealable directly to this Court if the dismissal "is based upon the invalidity or construction of the stat-

ute upon which the indictment or information is founded." Otherwise it is appealable to the court of appeals. Petitioners' position is that the district court's dismissal of the indictments in this case was "based upon" a "construction" of the Anti-Kickback Act and was therefore appealable only to this Court. Our response is that (1) the appeal was properly taken to the court of appeals, and (2), in any event, there is no occasion for this Court to consider the jurisdictional question in ruling on the petition for certiorari.

1. The provision in the Criminal Appeals Act for direct appeals to this Court has been consistently construed by this Court "to mean that review can be had here only if a district court's decision was based exclusively upon the invalidity or construction of a statute." *United States* v. *Petrillo*, concurring opinion of Frankfurter, J., 332 U. S. 1, 14, citing *United States* v. *Hastings*, 296 U. S. 188, 192, 194; *United States* v. *Borden Co.*, 308 U. S. 188, 193; *United States* v. *Swift & Co.*, 318 U. S. 442. See also *United States* v. *Jones*, 345 U. S. 377; *United States* v. *Wayne Pump Co.*, 317 U. S. 200, 208. And the scope of review in this Court on such an appeal is limited to the issue of statutory construction or validity upon which the decision of the district court was based. "The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, *supra*. See also *United States* v. *Hastings*, 296 U. S. 188, 192; *United States* v. *Kissel*, 218 U. S. 601, 606–607; *United States* v. *Keitel*, 211 U. S. 370, 397–399.

The district court's orders dismissing the four indictments are silent as to the reasons for the court's action (R. 100–101, 113–114, 125–126, 130–131). Those reasons can be determined, if at all, only by inference from the grounds for dismissal asserted in the motions to dismiss (R. 94, 96, 98, 108, 111, 121, 122, 123). The grounds may be summarized as follows: (1) the indictments do not state facts sufficient to constitute an offense against the United States; (2) the contract between the Air Force and General Motors Corporation (which was not part of the indictments, but was submitted for the court's consideration on the motions) was contemplated to be, interpreted and denominated a "fixed price" contract and not a "cost reimbursable" contract within the meaning of the Anti-Kickback Act; (3) the alleged kickbacks would not be included in the price or ultimately borne by the United States and were therefore not within the contemplation of the statute; (4) since the contract was classified, petitioners did not and could not know or have knowledge of the nature of the contract; and (5) the contract does not show approval in writing by the Secretary of the Air Force and therefore is not binding and cannot constitute a "contract" under the statute. Thus, the possible grounds for decision were (1) a failure of the indictments fully to plead an offense, (2) an interpretation of the contract, (3) a construction of the statute, or (4) a construction of the contract and the statute.

It is clear enough from the competing contentions urged by the parties that the primary issue between them throughout has been one of interpretation of the

contract, with petitioners contending that it is a fixed-price contract with a redetermination clause and, as such, not within the coverage of the statute, while the government claims that it is a cost-reimbursable contract within the statute. As petitioners state in their reply brief (p. 6), "the reason that the contract is in the record is because it was agreed by the Government and defendants that, with the contract before the Court, a final determination of the issues could be made; and if favorable to defendants, thereby avoid a long and expensive trial." The opinion of the court of appeals, the petition for a writ of certiorari, the government's brief in opposition, and petitioners' reply brief are replete with references to the terms of the contract and their meaning.[1] The issues tendered by the petition for certiorari are (1) whether the terms of the contract constitute it a "cost reimbursable" contract within the meaning of the statute and (2) whether knowledge of the nature of the contract on the part of petitioners is a necessary allegation in the indictment. The resolution of the issue as to the applicability of the statute inevitably involves an interpretation and characterization of the contract. At best, the question is a mixed one of inter-

[1] After reviewing the provisions of the contract, the court of appeals said (255 F. 2d. at 688): "When all of the provisions in the contract are considered together as constituent parts of a harmonious whole, it cannot be said that the contract was exclusively a fixed price contract as distinguished from a cost reimbursable basis contract. It partook of both aspects. It was in substance and effect a fixed price and 'other reimbursable basis contract'. And partaking in part of an 'other reimbursable basis contract', it came within the range of" the Anti-Kickback Act.

pretation of the contract and the statute. Certainly it cannot be said that the issues tendered to and decided by the district court, even as elucidated and clarified by the arguments advanced in the court of appeals and here, involved exclusively a question of construction of the statute. If such had been the case, there would have been no occasion to submit the contract to the court for its consideration in deciding the motions to dismiss. In these circumstances, the limitations upon this Court's jurisdiction under the Criminal Appeals Act, as enunciated in the cases cited above, required that the appeal be taken to the court of appeals.

2. While, for the foregoing reasons, we believe that the appeal was properly taken to the court of appeals, we submit that that question need not be considered or resolved by this Court in passing on the petition for a writ of certiorari and that the existence of that question affords no occasion for the granting of the writ.

The question suggested by the petitioners' reply brief can be reviewed by this Court only on certiorari. While that question turns on whether the appeal should have been to this Court—and thus indirectly involves the appeal jurisdiction of this Court—the precise question is whether the *court of appeals* erred in taking jurisdiction of the appeal. Clearly there is no right of appeal to this Court from such a decision by the court of appeals and the proper method of review of that question—like other questions going to the court of appeals' jurisdiction—is by certiorari. If this Court should grant certiorari and reverse the court of appeals on the jurisdictional question, it could

then, of course, proceed to dispose of the case as an appeal from the district court certified to it by the court of appeals under the Criminal Appeals Act.[2] But the appeal jurisdiction of this Court is not, and on the present record cannot be, invoked unless the Court first grants certiorari and reverses the court of appeals' decision as to its jurisdiction. In the present posture of the case, accordingly, the only question before the Court is whether it should grant certiorari to review the judgment of the court of appeals.

On that question—whether to grant certiorari—it is submitted that the latent jurisdictional question, not having been stated as a question presented in the petition, is not entitled to consideration as a reason for granting the writ. Moreover, that question was

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[2] The Act provides (18 U. S. C. 3731, last paragraph):

> If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

Thus the effect of a holding that the court of appeals lacked jurisdiction in this case would be, not that the court of appeals should have dismissed the appeal, but that it should have referred the appeal to this Court. See *United States* v. *Wong Pang Chu*, 317 U. S. 200, 209; cf. *United States* v. *Jones*, 319 U. S. 377. Rather than vacate the court of appeals' judgment and remand the case to that court for the formality of a certification of the case back to this Court, it would seem appropriate for the Court, if on certiorari it concluded that the court of appeals was without jurisdiction, simply to vacate the court of appeals' judgment and thereafter proceed with the case as an appeal certified to it under the Criminal Appeals Act.

neither raised nor expressly considered by the court of appeals, and petitioners clearly have no claim to certiorari to review a question they failed to raise below. Finally, as we have pointed out, the jurisdictional question depends, in this case, solely upon the characterization of an ambiguous and unexplained ruling by the district court; its resolution turns upon an analysis of the particular facts and presents no question of general applicability requiring review by this Court.

For these reasons, we submit that there is no occasion for the Court to consider at this time the jurisdictional question suggested in petitioners' reply brief.[3] Rather, the petition for certiorari should be judged solely on whether the questions presented on the merits should be reviewed by this Court. For the reasons stated in our brief in opposition, we believe that those questions do not merit review by this Court.

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[3] Indeed, the Court may find it unnecessary to consider the jurisdictional question even if it should grant certiorari. Whatever the Court concluded on that question, it would still need to dispose of the case on the merits—either as a review of the court of appeals' decision or as an appeal from the district court "certified" to it by the court of appeals (see note 2, *supra*). While that procedural distinction might affect the form of the mandate (whether the judgment of the court of appeals is vacated or is affirmed or reversed), it is doubtful whether, on the facts of this case, it would be of any other significance. If so, we suggest that the Court, rather than take *sua sponte* a question on which nothing of substance turned, would be justified in declining to consider the question and in proceeding to dispose of the case in the posture in which it was presented—*i. e.*, as a review on certiorari of the decision of the court of appeals.

and, accordingly, that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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